IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 8

CHARLES TOWNSEND,

Petitioner,

vs.

FRANK G. SAIN, SHERIFF OF COOK COUNTY; AND JACK JOHNSON, WARDEN OF THE COOK COUNTY JAIL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS.

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IN THE

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OCTOBER TERM, 1961.

No. 76.

CHARLES TOWNSEND,

Petitioner,

vs.

FRANK G. SAIN, SHERIFF OF COOK COUNTY; AND JACK JOHNSON, WARDEN OF THE COOK COUNTY JAIL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS.

QUESTIONS PRESENTED

1. Whether the affirmance by the United States Court of Appeals of a district court's dismissal of a petition was erroneous where the State court record, upon which the district court based its findings, shows that a police doctor, called at petitioner's request, injected a drug, which is a recognized medication for narcotics withdrawal, in a dosé equal to one-half the recommended usual adult dosage, and where the record, with conflicts in testimony resolved against the petitioner, shows that the drug did not overpower him or deprivé him of capability of voluntary action.

2. Whether the petitioner can litigate a legal issue in Federal *habeas corpus* which he did not litigate in the State court in his appellate review of the challenged conviction even though the evidentiary basis for such claimed issue existed in the trial court record; and whether the petitioner can rely on coroner's minutes of inquests where such records have never been considered by an Illinois court because the petitioner successfully moved for their exclusion in the original trial.

STATEMENT OF THE CASE

The following is a statement of facts, as developed in the trial of this petitioner. It also includes a summary analysis of all prior proceedings.

Undisputed Facts

This record (R. C597-642) discloses that Jack Boone, Sr., a 43 year old steelworker who lived with his wife and his two sons at 3754 South Michigan Avenue, Chicago, Illinois, left for his place of employment on the morning of December 18, 1953. The apartment building in which he resided was set back from the sidewalk about 100 feet and was reached by walking along a narrow, dimly illuminated passageway. Approximately 6:00 o'clock that evening, Helen Clark, a friend of the Boone family, discovered the senior Boone lying in the passageway, face down, with blood on the back of his head, behind his right ear. Mr. Boone's wife was called and he was taken to a hospital where he died on December 21, 1953. When Boone had left for work, he had a pocket wallet and about four dollars on his person. This wallet was discovered during late morning, December 18, 1953, in an apartment building at 117 East 37th Place, Chicago, Illinois, by a 12 year old boy. This building was located near the Boone residence.

The boy gave the wallet to his father and he delivered it to his wife's cousin. This cousin in turn gave it to Mrs. Boone who delivered it to a Chicago police officer, George Martin, on January 5, 1954.

On December 29, 1953, officers of the Chicago police department arrested one Vincent Campbell (R. C769-771) who was later convicted and sentenced for robbery (R. C761). Campbell was still in custody during the early morning of January 1, 1954, when he accompanied police officers Martin, Fitzgerald, Cagney and Corcoran in a squad car to the vicinity of 35th and South Indiana where he identified for the police officers the petitioner, Charles Townsend walking with a friend (R. C643-645, C757-758). From his uncontroverted testimony it appears that Vincent Campbell knew the petitioner well. On a weekend during December, 1953, he saw Townsend walking in the neighborhood with a house brick in his hand. Campbell asked the petitioner how he was doing and the petitioner replied that he was going to make some money. Three or four hours later, he saw the petitioner in a billiard hall at 35th and South Prairie. At that time, Townsend entered the hall carrying a brown paper bag, torn on one end and wrapped around a house brick. He laid this bag on a nearby bench and asked to play with them. (R. C745-762)

The petitioner was arrested on January 1, 1954 about 1:45 A.M. He was 19 years of age and a confirmed heroin addict since 1952. By December of 1953, the petitioner was taking as much as six capsules a day (R. B92-93, B158-161, C811). One and one-half hours prior to his arrest, the petitioner injected himself intravenously with two and one-half capsules of heroin (R. B93, B192, B810). The petitioner had been unemployed throughout 1953 with the exception of an eight or nine day period during which he worked intermittently (R. B160-161).

The Director of the Behavior Clinic of the Criminal Court of Cook County, who supervised the petitioner's Court ordered psychological and mental examinations before trial to determine the petitioner's ability to cooperate with his counsel and conduct his defense, testified that his diagnosis of the petitioner reflected a character disorder and drug addiction. A psychological I.Q. of 63 was determined for him (R. C782-784, D1027). When this was translated in terms of his mental I.Q. it attained a range between 75 to 80 for the petitioner. This was still in the area of below average intelligence and classified him as a mental defective. Nevertheless, he was legally sane and this figure compared favorably to the World War II average mental I.Q. of 78 (R.D1027-1030).

The arresting officers took the petitioner to the 2d district police station at 29th and South Prairie. They arrived at about 2:30 A.M. At the station the petitioner was asked his name and address and other identifying information by the lockup keeper who made out the arresting slip. This took about 5 or 10 minutes (R.B95, B251-252, B256). The petitioner was wearing a dark suit (R.B398) and a sport shirt without a tie (R.B 347). He was neatly dressed and answered the questions of the lockup keeper clearly and coherently (R.B 253).

Thereafter arresting officers took the petitioner to one of the rooms and questioned him for 30 or 35 minutes concerning various crimes which the petitioner denied having committed (R. B96, B253-254, B281, C647, C656). Thereafter, he was placed in the women's cell alone and about 5:00 A.M. was transferred to the 19th district station, which is located at 35th and South Wentworth. He arrived here about 5:10 A.M. He was interrogated by no one at the 19th district station. He remained there until that evening. Sometimes he would lie on his bunk and sometimes he would sit or sleep on it. He was returned to the

2nd district station about 8:30 P.M. (R. B 98, B 100, B 170, B 269, B 270-273). Although the petitioner admitted that food was available at the 19th district station (R. B 141), he refused food when it was offered to him (R. B 267).

About 8:30 P.M. at the 2d district station officers Cagney and Fitzgerald removed the petitioner from his cell. A short time later, a show-up was conducted in one of the rooms. The petitioner and three other prisoners were viewed by an insurance agent, Gus Anagnost, who identified one of the three other persons as the man who had robbed him. Mr. Anagnost then left the room (R. B 102-104, B 292, B 349-355, B 423-424, B 476-477). Immediately thereafter, a fight broke out between Townsend and the prisoner identified by the insurance agent (R. B355, B426-428, C704-705, C826-827). Townsend was not injured (R. B357). All four arresting officers witnessed the show-up which lasted about ten minutes (R. B 295, B 349, B 423-425, B 477-478).

Shortly thereafter, petitioner was questioned in the same room by officer Cagney about the Boone killing and other matters for at least ten minutes (R. B 107, B 347-350, B 649-652). To the time of the show-up, petitioner's appearance was neat and his speech was clear, distinct and coherent (R. B 252, B 260-261, B 263-264, B 267, B 276, B 322, B 347, B 422-423). After his arrest, he had admitted that he was a narcotics addict to the arresting officers, and that he had, only one and one-half hours earlier, given himself a shot. He complained to no one, at least up until the time he had been returned to the 2d district station at about 8:30 P.M., that he was sick (R. B99, B267, B270, B273, B323, B355, B358, B422). It was sometime during the questioning by Cagney, that petitioner complained of "stomach" pains and was occasionally holding his abdomen. Cagney then telephoned for a doctor (R. B108, B109-110, B352-353, B357-358, B360-361).

Shortly afterward, the doctor came. He was a police surgeon assigned to the central police station located at 11th and State Streets (R. B 111, B 211). Earlier, an assistant state's attorney had arrived at the 2d district police station (R. B 296, B 352, B 430-431, B 447, B 479, B 481). When the doctor arrived, he entered one of the detectives' rooms where petitioner was waiting (R. B 112-116, B 334). Cagney was present (R. B 116, B 334, B 367-368) when the doctor examined the petitioner, tested his heart and eyes, and when he used a hypodermic syringe to inject a solution into the petitioner (R. B 111-113, D 982).

Before the hypodermic injection, the doctor asked Cagney to obtain a glass of water; he then rinsed the needle and syringe in the saline solution, having first dropped a sodium chloride tablet into the glass. Then he withdrew about 2 cc.'s of saline solution into the syringe from a little bottle, dropped a ¼ grain of sodium phenobarbital and a 1/230 grain of hyoscine hydrobromide into the syringe solution to dissolve them and injected the solution into petitioner (R. B112-113, B214-215, B 240, D981-982, D988-989). He left four one-quarter grain phenobarbitals, five according to petitioner's testimony, and instructed the petitioner to take two around midnight and the others in the morning. Petitioner took two that night and the remainder the next day (R. B114-115, B126, B198, B216, B235, C835, C850-851). During the preliminary hearing, petitioner testified that he was neither questioned by nor saw an assistant state's attorney that evening. He later testified on the trial that he could not remember seeing the assistant state's attorney before the afternoon of January 2. Through impeachment by way of a transcript of his testimony at his earlier trial under indictment No. 54-10, tried in 1954, he admitted that he had previously testified under oath that he had seen and

given a statement to the assistant state's attorney during the evening of January 1, at the 2d district police station (R. B132, C877-902).

After the doctor left, he was returned to his cell, although it is disputed whether he was again removed and taken again that evening to one of the detectives' rooms (R. B122-125, B172-177, B272-273, B297-304).

He was not questioned or disturbed until sometime between 11:00 A. M.-1:00 P. M. of the following day, Saturday, January 2, 1959. Then he saw and talked with Cagney and Fitzgerald and the other two arresting officers, Corcoran and Martin (R. B126-133, B275-276, B305, B375, B393-394, B429, B482), at which time he was told he would be going to the state's attorney's office. He was taken there in a police car by officers Cagney, Fitzgerald, Corcoran, and one Ellington, who was not a police officer but a witness, (R. B133-134, B177-178, B305, B375-376, B482). They arrived at the state's attorney's office, where they saw the assistant state's attorney who had been at the 2d district station the previous night (R. B133-134, B178-179, B306-308, B339, B376, B441). There, after he had been given a copy of a transcribed typewritten statement, consisting of four pages by the assistant state's attorney, and after he had been asked by the assistant to read petitioner's copy while the assistant read the original transcription, petitioner signed each page in the presence of the assistant, and in the presence of Cagney and Fitzgerald who witnessed petitioner's signature to People's Exhibit 2 in evidence (R. B135-136, B286, B288-289, B306-307, B339-341, B376, B442-444, C714, C715, C717, C737, C739-743). This transcribed confession, which was read into the record before the jury (R. C739-743), shows that prior to his answers to the questions he acknowledged that no threats or promises had been made to induce his confession. After he signed his confession, the petitioner was returned to the 2d district police

station where he arrived about 3:00 P. M. of the same day, Saturday, January 2 (R. B138, B307, B311, B394). The lockup keeper observed nothing unusual about petitioner's appearance upon the latter's return. He talked to him briefly. The petitioner spoke coherently and did not complain about anything (R. B394-395).

On Sunday, January 3, the arresting officers questioned petitioner from time to time, between 10:00 A. M. and 4:00 P. M. (R. B277, B312-316, B434-435, 489). That evening, he asked Cagney to call the doctor again because he was not feeling too well. Cagney again telephoned for the doctor. The police surgeon, who previously had treated the petitioner, arrived that evening (R. B138, B220-221, B287-388). The petitioner told the doctor that the previously prescribed medicine did not help him. He was not feeling too well. The petitioner was given a number of white tablets, each ½ grain phenobarbital, to take orally (R. B139, B221, B239, C850-851).

The following morning, Monday, January 4, the petitioner was taken to the coroner's inquest at the Cook County morgue, which was open to and attended by the public, among whom was his sister, the assistant state's attorney who had previously taken the statement from him, and the four arresting police officers. After being advised of his right not to testify and of the fact that any statement made by him might subsequently be used as evidence against him, petitioner under oath again proceeded to confess the Boone murder (R. B143-148, B178-181, B184, B316-317, B380-381, B383-385, B433-435, B445, B488, C692, C905).

Disputed Facts

During the preliminary hearing on his motion to suppress and during the trial, the petitioner gave certain testimony, which was disputed by the evidence of the prosecution. It is

this disputed testimony, which actually gives rise to the issues in this *habeas corpus* proceeding.

The petitioner testified that, upon his arrest on January 1, 1954, he was taken to the 2d district station and interrogated for a total of thirty minutes by Officers Cagney and Fitzgerald (R. B96). Approximately five to ten minutes of this period were devoted to interrogation regarding the Boone murder, of which the petitioner denied any knowledge (R. B95-96). Before he left for the 19th district station, he stated that he was questioned again about 4:00 or 5:00 A. M. of the same morning (R. B97). Interrogation was not resumed until 9:00 P. M. of the same day upon his return to the 2d district. This questioning was conducted by Officers Cagney, Fitzgerald, Martin and Corcoran (R. B99, B101, B156-158). The evidence for the prosecution reflects that the petitioner was not questioned about the Boone murder until about 9:00 P. M. Friday, January 1, 1954 (R. B372-373, C647-649, C656). He was being held for investigation of several murders and robberies (R. B401). He was not questioned around 4:55 A. M. Friday immediately before his transfer to the 19th district station (R. B254-255). During the course of the interrogation Friday evening, the petitioner, in response to one of Cagney's questions, admitted the Boone murder and robbery (R. C649-652). The four arresting officers questioned the petitioner between the short show-up and the arrival of the assistant state's attorney (R. B348-352).

Before the interrogation on the evening of January 1, 1954, the petitioner testified that he was in a show-up with Vernon Campbell, George O. Jackson and Theodore Redd when an insurance man identified Redd as his robber (R. B102, C823). Thereupon, Cagney stepped out into the hallway with the insurance man and the petitioner heard Cagney tell him that he had identified the wrong person and that the petitioner should have been identified (R

B102-104). The petitioner then testified that Officer Fitzgerald told him that he, the petitioner, knew that he was the robber. Fitzgerald then struck him in the abdomen, whereupon the petitioner fell to the floor on his knees and vomited water and blood (R. B105-106, C827). During the trial, the petitioner added to his testimony. He stated that first Fitzgerald and then Cagney had slapped his face (R. C819, C821). After the identification by the insurance man, the petitioner turned to Redd and inquired as to whether the latter was satisfied since the other three prisoners in the show-up had "told lies" on him. He and Redd began to fight and wrestled to the floor where they were finally separated by the police officers (R. C826-827). Witnesses for the prosecution testified that the show-up began about 8:45 P. M. (R. B423, B427, B481) and lasted about ten or fifteen minutes (R. B478). Vernon Campbell, Oliver Johnson and George Hare were in the show-up with the petitioner (R. B292, C682). The insurance agent identified Oliver Johnson, left and never returned (R. B292, B353, B424, B476-478). The police officers denied that they talked to the insurance agent after the identification and urged him to change it or later caused the petitioner to admit that he robbed him (R. B293, B336, B353-354, B425-426, B479). After the insurance agent left, the petitioner laughed. Oliver Johnson said, "What do you want to do me like that for?" Then, he swung at Townsend with his fist and they wrestled to the floor. They were separated by Officers Corcoran and Martin. This commotion brought Officers Fitzgerald and Cagney back into the room (R. B355, B426-427, C704-705, C774). A short time later, the petitioner said to Oliver Johnson, "Don't worry, man, I'll take you off the hook" (R. C705). Then Vernon Campbell told the petitioner, "Charley, why don't you tell the truth and tell them you are the guy that is going around hitting people on the head with a brick?" (R. C705-706).

The arresting officers, as well as the lockup keepers, denied that they struck, threatened or abused the petitioner either before, during or after the show-up. They did not see anybody else do so in their presence (R. B255, B283, B334-335, B337, B340, B417-418, B467-468). They testified that the petitioner voiced no complaints during this period (R. B255, B267, B270, B273). They made no promise that they would attempt to procure morphine for him, send him to the hospital, call a doctor, or promote leniency or immunity from prosecution in return for his confession (R. B283, B284, B334-336, B337, B341-342, B418, B468, B470). The petitioner did not vomit water or blood in their presence; they saw no blood or water (R. B283-284, B294, B335 B418, B433, B467). The two attending janitors, who worked the following morning, found no blood or water in any of the detectives' rooms (R. B401-408, B410-414). During the period in question, the petitioner did not sweat nor did he appear nervous or exhibit other unusual behavior. He spoke coherently and otherwise behaved quite normally (R. B322-324, B347, B359, B362, B423, B479-480).

The petitioner testified that shortly thereafter the officers began to question him again and then returned him to his cell (R. B107). Officer Cagney asked the petitioner if he was ill and the latter advised the officer he was sick from using narcotics (R. B107-108). About five or ten minutes later, Cagney told the petitioner that he would call the doctor (R. B110). Shortly thereafter, the petitioner testified, the doctor came into the room (R. B111) but not before he conferred with the police officers in the hallway (R. B112). The prosecution witnesses testified that, shortly after the show-up, the petitioner began to complain of abdominal pains, was holding his abdomen with his hands, and was leaning over. The petitioner asked to see a doctor and Cagney called for the police surgeon. The petitioner also requested a "jolt" (R. B353, B355, B357,

B360-361, B428). About 9:30 P.M., before the doctor's arrival, the assistant state's attorney arrived (R. B352, B430-431, B481). The assistant state's attorney, in Cagney's presence, asked the petitioner a few questions but the petitioner, who appeared nervous and was complaining of abdominal pains, stated that he would rather not talk until he saw a doctor. In response to the assistant's question, the petitioner again requested a doctor at which time Officer Cagney advised the assistant that he had already summoned the doctor. The assistant state's attorney left the room and the doctor came about 9:45 P.M. (R. B358-366, B447-449). The doctor was directed to the detectives' room by the desk sergeant and spoke to none of the arresting officers before he saw the petitioner or administered to him in Cagney's presence (R. B223-224, B284, B293-295, B334, B359, B366-368, B429-431, B449, B469, B479).

The petitioner testified that the doctor arrived about 10:00 P.M. and remained only a few minutes (R. B114, B171). He told the petitioner to unbutton his shirt, checked his heart and looked at his eyes. He opened a little black bag and took out some powder. He placed this powder in a syringe, dissolved it with water, clamped the petitioner's left arm with a rubber band until a vein bulged and injected the solution into the vein (R. B112-113). The doctor then gave him five pink or red pills and directed the petitioner to take two immediately and the balance in the morning (R. B114-115, B197-198). The petitioner took three with water (R. B115, B198). All four arresting police officers were present at the time. In response to a question from Cagney, the petitioner stated that he felt "all right" (R. B116-117). Up to that time, the petitioner testified that he had denied all criminal accusations (R. B111). The police surgeon testified that he thoroughly examined the petitioner's chest, back, neck, head, face, arms, and hands. He palpated over the petitioner's chest with his

hand and fingers, and then used his stethoscope. The doctor inquired about the marks on his left arm. The petitioner explained that he was ill from narcotics withdrawal and described his pains for the doctor. The doctor observed a cold perspiration over the petitioner's face, neck, body and arms. He diagnosed the petitioner's symptoms as resulting from drug addiction and withdrawal (R B212-215). He dissolved a sodium phenobarbital tablet and a piece of a hyoscine tablet (not powder) in the syringe, and after the injection he gave the petitioner only four white, not five pink or red tablets (R. B214-217, B235-236).

The doctor did not tie or bind the petitioner's left arm with a rubber band. He injected the solution into the shoulder muscle of the petitioner's left arm and not in any vein (R. B368, D982), even though the petitioner asked that it be injected into his wrist (R. B215). Examination by the doctor disclosed no bruises on the petitioner. The petitioner did not complain of any bruises or nausea. He could not see or smell any evidence of vomit (R. B222-223). After the injection, the petitioner said he felt better. (R. B370). He placed the four tablets, given to him by the doctor, into one of his pockets and took none, if any, until midnight (R. B304, B341, B370).

The petitioner testified that, after the injection, the insurance agent was returned. By this time, he was feeling "dizzy", sleepy in other words (R. B117, B119). He could see no more than two feet in front of himself. Prior to the injection, his vision was satisfactory. Things now looked dim and he could no longer hear too well (R. B118-119). He heard someone say that he should admit the robbery of the insurance man. He replied in the affirmative but does not know why (R. B210). He had no memory after the drugs, and this condition continued until the afternoon of the next day (R. B151-153). The next thing the petitioner remembered is being seated next to a desk and

seeing a person he did not know. He was sleepy. He actually fell asleep but was awakened by Cagney (R. B121-122). He could see only poorly. Cagney handed him a pen and told him to "sign", stating that the petitioner was going out on bond. He does not recall what he signed (R. B122-123). He assumes he was taken to his cell because later Cagney awakened him and took him back to the detectives' room (R. B123, B172-175). There were quite a number of people in the room and bright lights were flickering in his face. He did not recognize anybody or see very well (R. B123, B176). He was sitting and was told to hold his head up. The lights flickered for a minute or so. He was returned to his cell where he was left undisturbed the remainder of that night (R B124-125, B176).

According to the testimony for the prosecution, the petitioner had specifically been questioned for the first time since his arrest, about the Boone murder about 9:00 p.m. (R. B372, B433, B656). After the doctor's treatment and immediate departure, which was about 10:30 p.m. (R. B216, B298, B370, B456), petitioner was again visited by an assistant state's attorney, who either then or earlier had been introduced as such to petitioner (R B371, B450). He was questioned by the assistant about 25 minutes (R. B372). The assistant asked Townsend how he felt and the petitioner replied, all right. The assistant observed that Townsend, who prior to the doctor's arrival had been shaking a little and complaining of cold chills (R. B448, B450, B456), now exhibited a normal appearance and spoke more strongly (R. B455-457). He did not know what the doctor had administered to petitioner, if anything, but he knew that the petitioner had been seen by the doctor (R. B451). He would not have questioned petitioner if he had known that the doctor had given petitioner anything which would affect his mental processes adversely. (R. B452-454).

Thereafter, petitioner, the assistant, Fitzgerald, Cagney,

and a court reporter, employed by the state's attorney's office, went into another larger room, where there was a desk. Petitioner's confession concerning the Boone murder was dictated to the court reporter for about 10 minutes, beginning about 11:15 p.m. Only the assistant questioned petitioner, who answered clearly, distinctly and coherently (R. B282, B298-299, B301, B370-373, B391-392, B304, B374-375, B481). The assistant State's attorney had left about 11:30 p.m. (R. B726-727).

The arresting officers testified that none of them, nor anyone in their presence, ever gave papers to the petitioner for signature or placed a pen in his hand. They did not see the petitioner identify himself as the robber to the insurance agent nor did they induce him to do so. They did not see flickering lights in the evening of January 1, or at any other time (R. B285-286, B336-338, B418-419, B469, B472, B487).

The petitioner testified that he took the balance of the pills on Saturday afternoon, January 2 (R. B126). Up to Saturday morning, he did not remember that he confessed the Boone murder to anyone. His head was much clearer now (R. B126). He saw Cagney Saturday morning between 10:00 and 11:00 a.m. and Cagney showed him a newspaper, which carried the petitioner's photo and a story that he had confessed the previous night (R. B123-127). Thereafter, he was taken to the detectives' room by Cagney and two others and was questioned about all the robberies and murders around 55th Street. He confessed to all of them (R. B128-130). He was then told that he would be taken to the state's attorney's office (R. B131).

The petitioner testified that no assistant state's attorney had talked to him prior to this time and he could not remember any statements he had made Friday night (R. B132-133). He had no clear memory again until Saturday afternoon (R. B152). He had never previously seen the

assistant state's attorney, whom he met Saturday afternoon (R. B135). In the earlier trial under indictment No. 54-10, tried in 1954, he testified under oath that he had seen and given a statement to the assistant state's attorney during the evening of January 1 at the 2d district police station (R. C877-902). The assistant handed the petitioner some papers and asked petitioner to read along with him. He claims he was still half asleep and could not see as well as ordinarily. He could not make out the words on the papers and he did not understand what the assistant was reading (R. B135). Cagney asked him to sign and he signed without objection. He does not know why (R. B136). He was then returned to the 2d district station (R. B138). He did not read the papers which he signed nor did he know what they were (R. B138).

The arresting police officers testified that none of them had shown the petitioner a newspaper, the following morning, January 2 (R. B285-286, B336-338, B418-419, B469, B472, B487). No newspaper photographs were taken until later that Saturday afternoon while the petitioner was going to the state's attorney's office, and later at the inquest (R. B380). Witnesses for the prosecution further testified that, at the state's attorney's office on Saturday afternoon, January 2, the petitioner was given a copy of the Boone murder confession, which had been stenographically recorded Friday night and which was now transcribed and typewritten. The petitioner appeared to be following the assistant as the latter read from the original; he turned the pages as the assistant turned the pages. The petitioner signed each of the four pages. He did not appear sleepy or complain in any manner. The petitioner was not abused, threatened or promised anything to obtain his signatures (R. B286-289, B308-310, B340-341, B376-379, B440-455). The police officers denied that at anytime Saturday they questioned the petitioner any further re-

garding the Boone murder (R. B311-316, B432-435, B438, B489). They did not prompt him in any manner whatsoever before the visit to the state's attorney's office (R. B287-288, B315-317, B339, B341-344, B418-419, B471-472).

The petitioner testified that he saw the doctor again Sunday night, January 3. He informed the doctor that he was not feeling well and received six or seven white pills that looked like aspirin. He was instructed to take four at that time and the balance the following morning, namely Monday (R. B139, C850-851). Thereafter, his eyes refused to remain closed and he could not sleep at all. He had to force his eyes to remain closed. "I would have them gripped together." He took the rest of the pills Monday morning (R. B140, C850-851). The doctor testified that he saw the petitioner a second time on Sunday evening, January 3, when the petitioner told him that the "medicine I gave him the other night didn't help him any". (R. B221). On Sunday evening, the doctor gave the petitioner only two ½ grain phenobarbital tablets (R. B238-239).

The petitioner further testified that on Monday morning, January 4, he went to the inquest. Before this, Cagney again took him into one of the detectives' rooms, where the other arresting officers were present. He asked the petitioner if he could remember his confession of Friday night (R. B140-143). The petitioner replied that he did not even remember making a statement at all. All the officers laughed (R. B143). Cagney read the statement to him, and in the police car instructed him not to change his statement at the inquest (R. B143). At the inquest, the petitioner testified and admitted the Boone murder (R. B148). The police officers denied that they had prompted the petitioner at any time before the coroner's inquest of January 4, where the petitioner again confessed the Boone murder (R. B287-288, B315-317, B339, B341-344, B418-419, B471-472).

Expert Testimony

Dr. Mansfield, the police surgeon, testified that hyoscine is a drug used many times by him to depress and sedatize drug addicts, as well as people of psychopathic tendency (R. B215). A sedative is a drug or medication utilized and given to quiet a person, settle his nerves or put him to sleep (R. B224-225). Phenobarbital is also a sedative and, being a barbiturate, it is also an anodyne or pain-deadener (R. B225-226). In this case, however, he considered it the sedative, and hyoscine the anodyne (R. B225-226).

He had examined about twenty thousand narcotics addicts in his experience, about seventy percent of whom were addicted to heroin (R. B217-218). He had treated about six to seven thousand cases of narcotics withdrawal cases (R. B218). In about fifty percent of that number he had used the same injection and treatment he administered to the petitioner (R. B218, D1010).

Acute withdrawal symptoms, he testified, usually include complaints about pain in the abdominal area, of sickness, weakness, and an inability to remain emotionally still. The patient is restless and talkative; moist perspiration usually covers his face and body. In severe cases, he will vomit on the least provocation. He cannot keep water down, nor take food—in fact, he will refuse food, except sweets like candy or chocolate. He desires quiet. He suffers spells of quietude and sleep, then wakefulness with hilarious screams (R. D1017-1018).

The phenobarbital, based on his experience, combines very well with hyoscine in the proportion and quantity used to quiet the addict, to pacify his mind, to delay emotions of hilarity, noisiness and excitation (R. B215-216), without putting him to sleep (R. B215-216, B228). The addict in withdrawal is suffering from a nervous reaction

(R. B247), and the small amount of phenobarbital injection counteracts the activity of the sympathetic nerves, especially in the abdominal area (R. B243), while the hyoscine relaxes (R. B226-227). The combination given rests and relaxes the subject (R. B227, B243, D1019).

He could recall no case in his experience where his use of the drug hyoscine produced amnesia or loss of memory. He considered that the injection used on Townsend, alone or together with the sodium phenobarbital tablets for oral administration, could not have resulted in loss or lapse of memory in the case of petitioner or have impaired his vision or otherwise adversely affected his mental condition to the point of depriving him of his will or putting him to sleep. He denied using the drugs for that purpose (R. B216, B218-220, B228, B231-232, D982-983, D1001, D1010). He used the injection and treatment in question because petitioner was tense and firm (R. B226). In order to sedatize completely and narcotize petitioner, he would have had to have administered three or four grains of phenobarbital (R. B233) or a ½ grain of hyoscine (R. D988-990), or one and one-half to two grains phenobarbital to put him to sleep (R. B243). The creation of amnesia would require 1/100 of a grain of hyoscine, the so-called normal dose, plus another 1/60 of a grain of hyoscine, or a large dose of phenobarbital and hyoscine combined (R. D1008-1009).

On cross-examination during the preliminary hearing, the colloquy ran as follows at one point (R. B228):

> Q. You gave him something that would knock him out?
>
> A. No, sir.
>
> Q. Doctor, you testified before, in a case where this man was being tried?
>
> A. Yes.
>
> Q. Did you give him any truth serum or anything—
>
> A. No.

Q. —that you considered that?
A. No.
Q. You never told anybody that you did that?
A. I never saw any in my life.

Testifying on behalf of petitioner, both during the preliminary hearing and upon the trial, Dr. Charles D. Proctor stated that he was not a licensed physician, but possessed a doctorate in pharmacology and toxicology (R. B495-499). At the time of the trial, he was an assistant professor in pharmacology and toxicology at Loyola University Medical School (R. C498). He had worked for the Cook County Coroner's office, with and for doctors, and at the Cook County Hospital (R. C504). He testified that he is acquainted with the drugs hyoscine and phenobarbital (R. C499-C500), and acquainted with leading and recognized pharmacological and toxicologial and other related medical texts on therapeutics and physiology (R. C506-507). He admitted that he has never prescribed treatment for drug addiction and had never observed the effect of hyoscine on human beings. His experience was virtually limited to text book materials (R. C564-566).

He considered the normal range of hyoscine drug injection between .25 and .3 milligrams, translating 1/100 grains hyoscine to .6 mgm. and 1/200 to .3 mgm. (R. D1090-1092). He considered the administration here, that of a fraction less than .29 mgm. well within the normal range (R. D1092). He considered the one-eighth grain phenobarbital given hypodermically a very low sedative dose, and further considered a ¼ grain a very low dose (R. D1093). He placed the normal dose of phenobarbital for sedative effect at 45 mgm. to 60 mgm.; 60 to 90 mgm. were necessary for hypnotic or sleep-producing effects, whether administered orally or hypodermically; he equated one-half grain of phenobarbital to 30 mgm. (R. D1090-1091).

Hyoscine, in his opinion, exaggerates three symptoms of the narcotic addict's withdrawal stage—restlessness, prostration and excitation. The disorientation of the addict would be increased, affecting consciousness and memory within a wide range, from zero to all (R. C506-507, C555, D1087, D1094). Within this wide range, it accordingly produces no severe amnesia or memory loss as to details and events occurring during the period under the influence of hyoscine (R. C506-507, C537-538, C552-553, C580). There would also be effected an impairment of the person's consciousness, ability to reason and of his vision (R. C537-540, C542-543, D1087, D1089, D1118-1122). In its possible effect on the central nervous system, as a depressant, hyoscine could effect results ranging from absolute sleep, preceded by apathy and drowsiness, on the one hand, to complete disorientation and excitation and prostration and restlessness. (R. D536, D1118-1122). The duration of amnesia would be the same for an addict as for a normal person (R. D1094).

Phenobarbital, another depressant, would add to and exaggerate the depressive effect of the hyoscine (R. 537); it indirectly affects the subject's consciousness (R. D1089).

The effects of hyoscine on the subject's vision are described in terms of paralysis of the nerves, enervated sphincter muscles of the iris and of the ciliary muscle in eye lens, producing pupil dilations, cycloplegia, or loss of the ability to accommodate vision. This causes the subject to see objects more clearly at a distance than close up (R. C537-538, 568). This impairment of vision ordinarily lasts from four to six hours (R. C542). All of the effects from hyoscine last from five to eight hours (R. C538-540, C533-534, D1089, D1124).

Concerning the hypothetical case wherein an injection of .3 mgm. hyoscine, a slight fraction more than the .289

mgs., or 1 230 grains were used, Dr. Proctor's expert opinion was that the total drug injection and treatment resulted in impairment of the hypothetical person's ability to reason and of his vision. It increased disorientation, restlessness, anxiety, excitation and prostration; he suffered memory loss or amnesia and partial consciousness (R. C506-507, D1119-1121, D1125). He could, however, not actually describe the extent to which these symptoms or results operated here. He further based much of his testimony on the premise that the drug injection here operated at the first stage of the narcotics withdrawal symptoms or syndrome, which he estimated usually manifests itself from ten to twelve hours after the last narcotics injection (R. C535-536, C581).

During the course of his direct testimony, petitioner's counsel asked his own witness the following question (R. C541): "Mr. Branion: Q. "Doctor, is hyoscine a drug that is given to pregnant women who are about to have a baby, to induce twilight sleep?" " and the expert answered, "Yes", which was later stricken for reasons not here pertinent.

Dr. Harry R. Hoffman, a licensed physician since 1910 (R. D1154-1155), and a specialist in nervous and mental diseases, testified for the prosecution on the trial in rebuttal. Between 1931 and 1941, he organized and directed the Behavior Clinic of the Criminal Court of Cook County, and was presently on the staff of that clinic (R. D1156-1157). He stated that he had used hyoscine as well as phenobarbital in his practice many times (R. D1157-1158). He has observed no case where hyoscine in normal dosage caused amnesia (R. D1159). With reference to the hypothetical person posed (*i.e.*, Townsend for all effects and purposes), he stated the injection in question could not have caused amnesia, nor put the subject to sleep (R.

D1160-1163). He referred to an old text, Lambert Towns Treatment of Drug Addicts, which advocates use of hyoscine (R. D1168). He himself has never used hyoscine in narcotics cases (R. D1167-1168). He considered the drug's effects upon a confirmed narcotics addict would be less pronounced than upon a normal individual (R. D1172). A similarity of symptoms, e.g., dryness of mouth and some difficulty in accommodation of vision would be present in both (R. D1169).

This witness had experience with hyoscine in treating palsy patients while a student at Rush Medical College and while he worked in the out-patient clinic. Palsy patients are treated with this drug because it has an effect on involuntary movements of the individuals in conjunction with morphine, hyoscine or scopolamine produce twilight sleep. Scopolamine is hyoscine.

The average adult dose of hyoscine is 1 200 to 1 100 grain (R. D1176).

Analysis of Prior Proceedings

The petitioner has prosecuted various proceedings since the challenged judgment of conviction was entered over six and one-half years ago. We have undertaken to present a summary analysis of those proceedings, all of which constitute a part of the record in the present action. This summary also includes an analysis of four petitions for writ of *certiorari*, judicial notice of which will be taken by this Court. *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 555.

In this analysis, attention is focused upon the contentions and representations made by the petitioner at a specific time. This summary is divided into three parts: first, the direct review of the trial by way of writ of error in the Supreme Court of Illinois, which resulted in affirmance by

that Court and denial of *certiorari* by this Court; second, the statutory post-conviction review, which was denied by the trial court, whereupon the Supreme Court of Illinois denied the writ of error and this Court denied *certiorari*; third, the federal *habeas corpus* proceeding, which was eventually dismissed by the district court, whereupon the United States Court of Appeals affirmed the judgment of dismissal and this Court granted *certiorari*.

I.

The challenged judgment of conviction was entered in the Criminal Court of Cook County on April 7, 1955 (R. D1319). The death sentence was imposed the same day (R. D1322). On April 25, 1955, petitioner's present counsel was appointed by the trial court to represent the petitioner in the prosecution of a writ of error to the Supreme Court of Illinois.[1]

Before the Supreme Court of Illinois, the petitioner contended that the confession was inadmissible because it was involuntarily extracted from him while he was under the influence of drugs, administered to him by a doctor, employed by the police, who had defendant under interrogation. The petitioner did not argue that the drugs were involuntarily administered and without his consent. He did not contend that the medical treatment given him was not proper or that required by good medical practice. It appeared without challenge by the petitioner that the medication, administered to him, was normally used to relieve an acute drug withdrawal case. That Court determined that the confession was voluntary and admissible, overruled other contentions, and, with two Justice dissenting, af-

1. Since that date, same counsel has represented the petitioner in the prosecution of all State and federal proceedings, including the present petition for writ of *certiorari*.

firmed the conviction. *People v. Townsend*, 11 Ill. 2d 30, 36-37.

The petitioner filed his petition for writ of *certiorari* in this Court on August 3, 1957 (O. T. 1957, No. 133, Misc.). In that petition, he represented that the record, made in the Criminal Court of Cook, indicated that hyoscine and scopolamine "are different names for the same drug" (p. 4). The petitioner further declared to this Court that the "drugs were administered to petitioner with his consent and with the avowed intention on the part of the police surgeon to alleviate the heroin withdrawal symptoms" (p. 8). The petition was denied by this Court, with one Justice dissenting, on October 14, 1957. *Townsend* v. *Illinois*, 355 U. S. 850. Rehearing was denied on November 25, 1957. *Townsend* v. *Illinois*, 355 U. S. 886.

II.

In March, 1958, the petitioner filed his petition for post-conviction review. (R. E11-22) in the Criminal Court of Cook County pursuant to the provisions of Chapter 38, Sections 826-831, Illinois Revised Statutes, 1957. In this pleading, he alleged that hyoscine is identical with scopolamine, a drug which is commonly known as "truth serum". He further alleged that this drug, whether alone or combined with phenobarbital, is not the proper medication for a narcotic addict, who is suffering from withdrawal difficulties (R. E15). He further contended that these facts were well known to the police surgeon who injected the drug. He conceded that his trial defense attorneys "were experienced lawyers in the defense of criminal cases" (R. E16). The petitioner further alleged that the police surgeon wilfully withheld from the Court, the prosecuting authorities and from the defense attorneys that he was aware of the identity of the drugs at the time of the injection and that they were

injected into the petitioner not for the purpose of rendering proper medical attention but for the sole purpose of inducing a confession. He continues to aver that the police surgeon and all prosecuting attorneys collaborated together to withhold this information from the petitioner, his counsel and the court (R. E17-18). These facts, it is alleged, did not come to the attention of the petitioner "until they were discovered by Counsel representing Petitioner on review" (R. E19).

This petition was dismissed by the trial court upon motion. The petitioner then prosecuted his petition for writ of error in the Supreme Court of Illinois to review the judgment of dismissal. That court entered an order denying the writ of error. (R. A30-31). The pertinent part of that order reads as follows:

> "The State's motion to dismiss relied upon the fact that petitioner had obtained a full review by this Court on a writ of error, and that our affirmance was *res judicata* as to all claims there raised and likewise as to all claims which could have been raised.
>
> "A study of our opinion on the writ of error disclosed that all of the evidence with respect to the injection of hyoscine and phenobarbital was carefully considered by us in resolving the issue of the validity of petitioner's confession. (*People* v. *Townsend*, 11 Ill. 2d, 30, 35, 44). Thus, it is clear that the issue of the effect of the drug on the confession was before us on the writ of error. The only matter which was not presented then was the fact that hyoscine and scopolamine are identical. In an attempt to escape from the doctrine of *res judicata*, the present petition for a writ of error contends that this fact could not have been presented to us because it was unknown to petitioner and his counsel at the [illegible]. Assuming for the moment the truth of this statement, we are of the opinion that the mere fact that the drug which was administered to petitioner is known by two different names presents no constitutional issue. At the original

trial there was extensive medical testimony as to the properties and effects of hyoscine. If hyoscine and scopolamine are, in fact, identical, the medical testimony as to these properties and effects would be the same, regardless of the name of the drug. In determining the effect of the drug on the validity of petitioner's confession, the vital issue was its nature and its effect, rather than its name. This issue was thoroughly presented, both in the trial court and in this Court. Furthermore, the claim by petitioner now that the State 'suppressed' this identity of hyoscine and scopolamine at the trial is destroyed by reference to the bill of exceptions from the original trial. A State medical witness, on cross-examination by petitioner's counsel stated: 'Scopolamine or hyoscine are the same' (Rec. 1173)."

Thereupon the petitioner filed his petition for writ of *certiorari* in this Court (O. T. 1958, No. 217 Misc.). In substance, he repeated the allegations of his petition for post-conviction review. Contrary to his representations in his first petition for writ of *certiorari*, filed in the previous term, the petitioner now stated "that the circumstances were such that the drug administered to him by the police surgeon was not at his request nor with his consent" (p. 16). This Court denied the second petition on November 10, 1958. *Townsend* v. *Illinois*, 358 U. S. 887.

III.

On December 12, 1958, the petitioner initiated this federal *habeas corpus* proceeding in the United States District Court. The essential allegations of this petition (R. A2-20) are a *verbatim* reproduction of his petition for post-conviction review, with the addition of specific allegations concerning crimes, other than the Boone murder (R. A9-12). He refers to and incorporates the minutes of the coroner's hearing on deaths other than the Boone death. This is the

first time that the petitioner has advanced the coroner's minutes in any proceeding. During the trial proceedings, in the Criminal Court of Cook County, the petitioner successfully resisted the introduction of any testimony of this character. During the preliminary hearing outside the presence of the jury on his motion to suppress, the petitioner and his defense counsel objected to the State's use of these minutes for purposes of impeachment on the ground that such use would "be highly prejudicial". The objection was sustained (R. B188-191). During the trial before the jury, the petitioner successfully objected to any reference by the State to questioning by the police during the evening of January 1, 1954 as to crimes other than the Boone murder (R. B374, C871-872). The district court dismissed the petition (R. A39). On December 17, 1958, the United States Court of Appeals dismissed the appeal. *United States ex rel. Townsend* v. *Sain*, 265 F. 2d 660. In his petition for writ of *certiorari* (O. T. 1958, No. 552 Misc.), the petitioner contended once again that the identity of hyoscine and scopolamine was not known to the petitioner and his trial counsel and that this fact was not revealed to the trial court (p. 4). He further represented in the same pleading (pp. 5-6) that this fact of identity "was not presented in the record made at his trial because this identity was discovered by other counsel who represented petitioner after his trial". On March 9, 1959, this Court granted the petition and, citing *United States ex rel. Jennings* v. *Ragen*, 358 U. S. 276, it vacated the judgment of the United States Court of Appeals and remanded the cause. *Townsend* v. *Sain*, 359 U. S. 64.

On remand, the district court received and examined the entire record of the State court proceedings. On June 24, 1959, that court entered its memorandum order, dismissing the petition (R. F133-137). The district judge found that the material allegations of the *habeas corpus* petition were

fairly raised and fully at issue in the State court proceedings and were reviewed and considered carefully by the State's highest court of review. He further found that the petitioner's federally safeguarded rights were accorded full and fair consideration in the State proceedings. The district judge also found that the findings of the State court that the challenged confession was freely and voluntarily given by the petitioner are correct, and that there was no denial of federal due process of law. The United States Court of Appeals affirmed. *United States ex rel. Townsend* v. *Sain*, 276 F. 2d 324. The present petition for writ of *certiorari* followed, and it was granted.

SUMMARY OF ARGUMENT.

The dismissal of the petition by the federal district court without further hearing after it determined, from its independent investigation of the State court records, that the petitioner's federal rights were fully protected and considered by the Illinois courts and that the challenged confession was voluntary, is in accord with well-defined procedural principles. *Brown* v. *Allen*, 344 U. S. 443, 465. In the analysis of the State court record, conflicts of testimony are authoritatively resolved by the state court's adjudication, *Watts* v. *Indiana*, 338 U. S. 49, 51-52, and where the petitioner alleges abuse and mistreatment by state officers, this Court will proceed on the premise that the petitioner was not abused or mistreated by such officials. *Reck* v. *Pate*, 367 U. S. 433, 400.

The record of the State court proceeding supports the determination of the federal district court to the effect that the challenged confession was voluntary. The petitioner was not subjected to continuous and incessant interrogation; the periods of questioning were few and limited in time. When he became ill from narcotics withdrawal, he requested a doctor, who was summoned by the police. The doctor administered a dosage of hyoscine and phenobarbital which is approximately half of the usual and normal adult dose. It was administered for purposes of medication. While it may have served to quiet him, it did not, and could not, overpower him to the point that he did not confess voluntarily on the evening of January 1, 1954. The petitioner does not, and in the light of his expert's testimony, he cannot contend that he was under the influence of the drug when he signed the challenged confession on the afternoon of January 2, 1954 or when he made oral ad-

missions at the inquest on January 4, 1954. Th State court record establishes that the petitioner was able and did make a narrative of events in which he detailed the facts.

The testimony of the petitioner in the Criminal Court of Cook County relative to his physical and mental condition is inconsistent with that of his scientific expert. Certain symptoms which this drug invariably produces, were not mentioned by the petitioner. His testimony regarding the impairment of vision contradicted his expert.

The medical texts, advanced by the petitioner, establish that the medication used is a recognized treatment for narcotics withdrawal difficulties. They further demonstrate that the dose, injected into the petitioner, was approximately one-half of the recommended usual adult dose.

Throughout these protracted proceedings, the petitioner has adopted a vacillating position with reference to both claims and evidence. Procedurally, the petitioner should not be entitled to raise his claim that the police surgeon withheld from the trial court the fact of the identity of hyoscine and scopolamine. The State court record shows that the factual basis for this legal issue, if any, was present in the evidence but the petitioner did not urge the question on his direct review in the Illinois courts. Furthermore, the petitioner should not be allowed to rely upon the minutes of the coroner's inquests of deaths, other than the Boone murder, because he successfully moved to exclude them in the original trial on the grounds that they were "highly prejudicial". Due to his trial maneuver, no Illinois court has ever seen or considered these minutes.

Finally, this Court can reasonably and rightfully consider the inconsistent and vacillating positions, adopted by the petitioner, in its appraisal of the sincerity and plausibility of the petitioner's claim.

ARGUMENT.

The Record of the State Court Proceedings Establishes That the Challenged Confession Was Voluntary and That the Petitioner Was Not Deprived of Any Federal Rights under the Due Process Clause.

The course of action, pursued by the federal district court and approved by the Court of Appeals, has been challenged by the petitioner. It represents no departure in federal *habeas corpus* procedure. On the contrary, it is consistent with all procedural principles and guides, as defined by this Court. The dualism of sovereignties, which is inherent in our national federation of states, gives rise to delicate relationships. Consequently, this Court has adhered to a policy of caution when its power has been invoked to examine the validity of challenged state Court judgments of conviction. It has been recognized that the administration of local criminal justice is the primary responsibility of the several states and that the state and federal courts have the same duty to protect persons from violation of their constitutional rights. Consequently, when a federal district court is exercising its judicial power in a *habeas corpus* proceeding, prosecuted for the avowed purpose of challenging the validity of a state court conviction, the "federal district court may decline, without a rehearing of the facts, to award a writ of *habeas corpus* to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies". *Brown* v. *Allen*, 344 U. S. 443, 465. The petitioner does not enjoy an absolute and unqualified right to a full hearing.

This is wholly within the discretion of the federal district judge. If that judge's determination that the petitioner's federal constitutional rights were protected and satisfied in the state court proceeding does not constitute an abuse of discretion, the district judge is warranted in his denial of relief without any further hearing. *Thomas* v. *Arizona*, 356 U. S. 390, 403.

We submit further that the procedure adopted by the federal district court in this proceeding was within the contemplation of this Court when it granted the petition for writ of *certiorari*, vacated the judgment of the Court of Appeals, and remanded the case. *Townsend* v. *Sain*, 359 U. S. 64. In its memorandum decision, this Court noted the decision in *United States ex rel. Jennings* v. *Ragen*, 358 U. S. 276. In *Jennings*, this Court, citing *Brown*, indicated that a district court must make its independent examination of the record of proceedings in the state courts before dismissal of the petition. We submit that the memorandum decision clearly authorized the district court to proceed in accordance with *Brown*. The federal pleadings were before this Court at the time. If, as the petitioner appears to contend, the district court was to grant a full hearing, it is reasonable to assume that such directions would have been given by this Court.

The basic issue in this controversy concerns the question as to whether the district judge abused his discretion when he decided, from his study of the State court records, that the petitioner's rights were fully protected and considered by the Illinois courts, that the Illinois courts correctly decided that the confession was voluntary, and, accordingly, dismissed the petition. We submit that the record of the State court proceedings fully supports the action of the district court.

This Court has formulated well-defined principles, which

are applicable in the analysis of the state court record. There has been complete agreement that any conflict in the testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes to this Court authoritatively resolved by the state court's adjudication. *Watts* v. *Indiana*, 338 U. S. 49, 51-52. The inquiry of this Court is limited to a study of the undisputed portions of the record. Conflicts in testimony are resolved against the petitioner by the state's adjudication. The underlying *rationale* lies "in the superior opportunity of trial court and jury to observe the witnesses and weigh the fleeting intangibles which may indicate truth or falsehood". *Thomas* v. *Arizona*, 356 U. S. 390, 402. In the presence of a conflict in testimony regarding abuse and mistreatment by state officers, this Court will proceed on the premise that the petitioner was not abused or mistreated by such officials. *Reck* v. *Pate*, 367 U. S. 433, 440.

I.

In accordance with the foregoing legal principles, with all conflicts in testimony resolved against the petitioner, an analysis of the record of the State court proceeding reveals the following facts.

The petitioner injected himself intravenously with two and one-half capsules of heroin at approximately midnight on December 31, 1953 (R. B93, C810). He was arrested by the police about 1:45 A. M. on January 1, 1954 (R. B93). The arresting officers took him to the 2d district police station where a lockup keeper obtained his name, address and other identifying information. His attire was neat. He answered the questions of the lockup keeper clearly and coherently. This was about 2:30 A. M. (R. B95, B251-256).

At the time of his arrest, the petitioner was nineteen years of age and had been a heroin addict since 1952 (R. B-

92-93). In January, 1952, the petitioner was given a psychological examination and a mental examination by order of the Criminal Court of Cook County. The diagnosis, made by the Director of the Behavior Clinic, reflected a character disorder and drug addiction. A psychological I. Q. of 63 was determined for him. (R. C782-785, D1027). When this quotient was translated in terms of his mental I. Q., it attained a range between 75 to 80. Although this was still in the area of below average intelligence and classified him as a mental defective, the petitioner was determined to be legally sane. Moreover, this I. Q. figure compared favorably to the World War II average mental I. Q. of 78 (R. D1027-1030).

After the lockup keeper had taken all the necessary record data, the arresting officers took the petitioner to one of the rooms and questioned him for approximately a half hour concerning various crimes which he denied having committed (R. B96, B253-254, B281, C647, C656). Thereafter, he was placed in the women's cell. About 5:00 A. M. he was transferred to another district station. At the latter station, he was interrogated by no one. He remained there until that evening, lying or reclining on his bunk. He was returned to the 2d district station about 8:30 P. M. (R. B98-100, B170, B269, B270-273).

Shortly after his arrival, a show-up was conducted in one of the rooms and the petitioner was one of four prisoners to appear in that show-up, which lasted about ten minutes. It was at this time that a fight broke out between the petitioner and another prisoner. The petitioner was not injured (R. B102-104, B292, B349-357, B423-428, B476-478, C704-705, C826-827). Up to this time, the petitioner's speech was clear, distinct and coherent (R. B252, B260-261, B263-264, B267, B276, B322, B347, B422-423). He complained to no one that he was ill (R. B99, B267, B270, B273, B323, B355, B358, B422).

The evidence for the prosecution reflects that the petitioner was not questioned about the Boone murder until about 9:00 P. M., Friday, January 1, 1954 (R. B372-373, C647-649, C656). The petitioner admitted that this interrogation occurred before the arrival of the doctor and lasted about a half hour (R. C870-871). It was at this time that the petitioner admitted that he struck and robbed the deceased, for which he now stands convicted (R. C649-652). At this point, the petitioner complained of stomach pains and, upon his request, the police officer called a doctor (R. B358-359).

The Assistant State's Attorney arrived between 9:15 and 9:30 P. M. The doctor had already been summoned by the police. The Assistant State's Attorney did not question the petitioner; he waited for the doctor to arrive. He did not see the doctor at any time during his visit to the police station. According to the assistant prosecutor, the doctor arrived and treated the petitioner between 9:35 and 10:10 P. M. When the assistant saw the petitioner again at approximately 10:10, the petitioner advised him that "he felt much better". The assistant did not have any knowledge of the treatment given the petitioner by the doctor (R. B446-452).

The doctor arrived about 9:45 P. M. (R. B358-366, B447-449). He was directed to the detectives' room by the desk sergeant (R. B223-224, B284, B293-295, B334, B359, B366-368, B429-431, B449, B469, B479). The doctor thoroughly examined the petitioner about the body, and observed a cold perspiration over the petitioner's face, neck, body and arms. He ascribed the petitioner's symptoms to drug addiction and withdrawal (R. B212-215).

Thereupon, the doctor prepared a mixture of one-eighth grain of sodium phenobarbitol and 1 230 grain, which is less than 0.29 mgm., of hyoscine hydrobromide, dissolved it

in 2 cc's of saline solution and injected it into the petitioner (R. B112-113, B214-215, B240, D981-982, D988-989). This solution was injected into the shoulder muscle of the petitioner's left arm (R. B368, D982) even though the petitioner asked that it be injected into his wrist (R. B215). The doctor left four one-quarter grain phenobarbital tablets with instructions to take two around midnight and the others in the morning. The petitioner took two that night and the remainder the next day (R. B114-115, B126, B198, B216, B235, C835, C850-851).

After the doctor left about 10:30 P. M., the Assistant State's Attorney visited the petitioner and questioned him for about twenty-five minutes (R. B371-372). Thereafter, petitioner, the Assistant State's Attorney, Officers Fitzgerald and Cagney and a court reporter, employed by the State's Attorney's office, went into a larger room. Petitioner's challenged confession concerning the Boone murder was dictated to the court reporter for about ten minutes, beginning about 11:15 A. M. Only the assistant questioned the petitioner, who answered clearly, distinctly, and coherently (R. B282, B298-299, B301, B370-373, B391-392, B304, B374-375, B841). Shortly thereafter, the Assistant State's Attorney left (R. B726-727).

The petitioner was taken to the State's Attorney's Office on January 2 about 1:00 P. M. (R. B307) where he met the Assistant State's Attorney who had taken the statement the night before (R. B441). The statement, which the defendant had given the night before, was then read to him after a copy thereof had been placed in his hands (R. B442). The petitioner appeared to be following the assistant as the latter read from the original; he turned the pages as the assistant turned the pages. After it had been read to him, he signed each and every page of it and initialed the caption of the case. The Assistant identified the signature. The petitioner did not appear sleepy or complain in any manner.

He was not abused, threatened or promised anything to obtain his signatures (R. B286-289, B308-310, B340-341, B376-379, B440-455).

The doctor saw the petitioner a second time on Sunday evening, January 3, when the petitioner told him that the "medicine I gave him the other night didn't help him any" (R. B221). The doctor gave him two more quarter grain phenobarbital tablets (R. B238-239).

On January 4, 1954, the petitioner testified at the coroner's inquest, which was an open hearing and was attended by his sister. There, he was sworn, and was advised by the deputy coroner of his right not to testify. Nevertheless, he chose to do so and again confessed to the Boone murder (R. B143-148, B178-181, B184, B316-317, B380-381, B383-385, B433-435, B445, B488, C692, C905).

The petition for writ of *habeas corpus* alleges that the medication was administered by the police surgeon without the petitioner's consent and that it was improper. The record of the State court does not support any such claim. The petitioner requested the services of a doctor. This necessarily implies a request for medical treatment. This surgeon, who had examined about twenty-thousand narcotics addicts and had treated about six to seven thousand cases of narcotics withdrawal, had administered the same injection and treatment to approximately fifty percent of those cases (R. B217-218). As noted previously (*ante*, p. 24), the petitioner did not argue to the Supreme Court of Illinois that the drugs were involuntarily administered and without his consent. The propriety of the medication was not questioned or challenged. *People* v. *Townsend*, 11 Ill. 2d 30, 36-37. As a matter of fact in his first petition for writ of *certiorari*, filed in this Court on August 3, 1957 (O. T. 1957, No. 133, Misc., p. 8) he expressly declared to this Court that the "drugs were administered to petitioner

with his consent and with the avowed intention on the part of the police surgeon to alleviate the heroin withdrawal symptoms".

We submit that the petitioner cannot challenge the propriety of the use of the drug. Fein, the author of *Modern Drug Encyclopedia and Therapeutic Index*, 8th Ed., (1960), The Reuben H. Donnelley Corporation, New York, a scientific treatise advanced by the petitioner in his brief, states at page 1116 that hyoscine or scopolamine is a *recognized* treatment for the withdrawal symptoms of narcotic or alcoholic addicts. This is conceded by the petitioner at p. 21 of his brief.

In his brief, the petitioner makes references to delirium and poisoning. There is no testimony in this record that the petitioner was delirious or poisoned and the petitioner gave no such testimony. He could not have been because the administered dose was so far below the recommended dosage. Any drug, including commercial aspirin, will produce a toxic effect if the administered dose is excessive. That the dose administered in this case was not only not excessive but, on the contrary, far below the recommended dosage is fully supported, once again, by the petitioner's own medical authorities. Fein at P. 1116 of his *Encyclopedia* reports that the recommended sedative dose is 0.5 mgm. (1 120th gr.) to 1.1 mgm. (1 60th gr.). *The Pharmacopoeia of the United States*, 16th Ed. (1960), Mack Publishing Co., Easton, Pa. (p. 637) in the case of scopolamine hydrobromide, designated the "usual dose—subcutaneous, 0.6 mgm." Goodman and Gilman in *The Pharmacological Basis of Therapeutics*, Second Edition, The Macmillan Company, New York (1955) (p. 554), report the adult dose at 0.5 mgm. These same authors report that this drug is used to prevent motion and air sickness. Studies reflect that 0.3 mgm. has been used with other drugs, and no impairment of military efficiency has been observed (p. 556).

The petitioner is now faced with the fact that his scientific authorities offer no support to his contentions. Hyoscine or scopolamine is a recognized treatment for withdrawal symptoms of narcotic addicts. While this drug, like any other drug, can produce toxic effects in case of excessive use, these same medical authorities agree that the usual adult dose is 0.5 to 0.6 mgm. The dose which the petitioner received, however, was 1.230th of a grain—less than 0.29 mgm. (R. B215). This is approximately half of the usual adult dose. Once again, the petitioner's case must be reduced to the State court record of the trial in order to ascertain what effect, if any, the medication had upon him.

Dr. Mansfield, the police surgeon, a man of broad experience with narcotic addicts and their withdrawal problems, testified that hyoscine is used to sedatize drug addicts. The addict in withdrawal suffers from a nervous reaction (R. B247). The phenobarbital, which is also a sedative, combines very well with hyoscine, in the proportion and quantity used, to quiet and pacify the addict without putting him to sleep (R. B215-216, B228). The combination given rests and relaxes the subject (R. B227, B243, D1019). He could recall no case in his experience where his use of hyoscine produced amnesia. The injection, administered to the petitioner, could not have resulted in a loss of memory, impaired his vision, affected adversely his mental condition to the point of depriving him of his will, or caused him to sleep. He did not use the drug for any of these purposes (R. B216, B218-220, B228, B231-232, D982-983, D1001, D1010). In order to narcotize the petitioner, the administration of three or four grains of phenobarbital (R. B233) or a ½ grain of hyoscine (R. D988-990) would be required. One and one-half to two grains of phenobarbital would be necessary to put him to sleep (R. B243). The inducement of amnesia would require

1 100 grain of hyoscine, the normal dose, *plus* another 1 60 gr. or a large dose of phenobarbital and hyoscine combined (R. D1008-1009). On cross-examination, he denied that he administered any "truth serum" or anything he considered "truth serum" to the petitioner (R. B228).

Testifying on behalf of the petitioner, Dr. Proctor is not a licensed physician (R. B495-499). He admittedly never prescribed treatment for drug addiction and never observed the effect of hyoscine on human beings. His experience was limited to text books (R. C564-566). He considered the hyoscine administered here in an amount less than 0.29 mgm. *well within normal range* (R. D1092). He considered the ½ grain phenobarbital given hypodermically and a ¼ grain a *very low dose* (R. D1093). One to one and one-half grains would be necessary for hypnotic or sleep-producing effects (R. D1090-1091). In his opinion, hyoscine administered to an addict, would affect consciousness and memory (R. C506-507, C575, D1087, D1094). The drug affects a person's vision in that it causes cycloplegia wherein one sees objects more clearly at a distance than close up (R. C537-538, 568). The effects of hyoscine last from five to eight hours (R. C538-540, C533-534, D1089, D1124). In response to a hypothetical question, purportedly relating to petitioner, his opinion stated that the injection resulted in impairment of vision and ability to reason. The hypothetical person suffered from amnesia and partial consciousness (R. C506-507, D1119-1121, D1125).

Dr. Hoffman, a specialist in nervous and mental disease, also testified on behalf of the State. He had used hyoscine as well as phenobarbital in his practice many times and observed no case where hyoscine *in normal dosage* caused amnesia (R. D1157-1159). With reference to the hypothetical person, *i. e.*, the petitioner, the injection in question could not have caused amnesia or put the subject to sleep (R. D1160-1165).

The gist of Dr. Proctor's testimony appears to be that, despite the normal dose of hyoscine and the very low sedative dose of phenobarbital, amnesia was produced. It must be remembered that this was the testimony of a non-physician, whose experience was limited to texts and not the observation of the effect of this medication on human beings. It was disputed by two medical doctors, who enjoyed years of experience in this field. Dr. Proctor's limited qualifications must have been recognized and appreciated by the petitioner because in his brief, filed in the United States Court of Appeals, he "admits that Dr. Proctor was not qualified to have his opinion taken in preference to that of Dr. Mansfield." *United States ex rel. Townsend* v. *Sain*, 276 F. 2d 324, 329, n. 4. At any rate, the question of the presence of amnesia in the petitioner is disputed in the evidence, which is authoritatively resolved against the petitioner by the State court's adjudication. *Watts* v. *Indiana*, 338 U. S. 49, 51-52. This court will proceed on the premise that such amnesia was not present in the petitioner. *Reck* v. *Pate*, 367 U. S. 433, 440. Moreover, this claim by the petitioner is open to serious question when one remembers that in a prior trial he testified under oath that he had *seen and given a statement* to the Assistant State's Attorney during the evening of January 1 at the 2d district police station (R. C877-902). This contradicts any claim of amnesia that he presently may make.

We submit that, on the basis of this State court record, the district court judge did not abuse his discretion when he found that the State court determination on the issue of voluntariness was correct and that the petitioner was not deprived of federal due process. On this record, his dismissal of this action without further hearing was well within his discretion. Although the petitioner was of limited intelligence, his quotient compared favorably with

the World War II average mental I. Q. of 78. He was found to be legally sane (R. D1027-1030). The petitioner was not subjected to continuous and incessant interrogation. On the contrary, the periods of questioning were very few and limited in time. He spent one whole day without any disturbance whatever. If a 0.3 mgm. dose could be administered to military air personnel without impairment of efficiency, how could a lesser dose affect the petitioner to deprive him of voluntariness? While the medication may have served to quiet him, it did not overpower him to the point that he did not act freely and voluntarily when he confessed on the evening of January 1. Prior to the administration of the treatment, and before the onset of his withdrawal difficulties, he admitted the robbery and murder of Boone, and this admission was the subject of cautionary instructions to the jury (R. D1274-1275). The petitioner's sworn testimony in a prior trial (R. C877-902) that he had seen and given a statement to the assistant prosecutor cannot be reconciled with any present claim of amnesia. The determination of the Supreme Court of Illinois that the challenged confession was voluntary was justified because this record clearly establishes that the petitioner was capable and did in fact make a narrative of past events in which he coherently detailed the facts, in answer to questions, concerning his commission of the crime charged. *People* v. *Townsend*, 11 Ill. 2d 30, 43. The judicial standard employed by that Court is not novel. *People* v. *Waack* (1950), 100 Cal. App. 2d 253; 223 P. 2d 486. A similar view has been adopted in the treatment of cases involving a confession by one who may be under the influence of alcohol. *McAffee* v. *United States* (1940), 111 F. 2d 199; cert. denied 310 U. S. 643.

Moreover, the petitioner did not contend either in the district court or in the Court of Appeals, and he does not contend now that his memory was in any way im-

paired on the afternoon of January 2 when he signed the challenged confession after it was read to him, or on January 4 when he admitted the crime at the inquest. Such a contention would be not only fruitless but groundless in view of the testimony of his expert, Dr. Proctor, that the effects of hyoscine endure from five to eight hours (R. C538-540, C533-534, D1089, D1124).

Finally, the contention that the police surgeon withheld the fact that hyoscine and scopolamine are identical from the Court and defense counsel, has no merit whatever. Although this claim constituted one of his primary contentions in both the State post-conviction proceeding and in this *habeas corpus* action, the petitioner no longer appears to address any argument to it. We suggest that the memorandum order of the Supreme Court of Illinois (*ante*, pp. 26-27), denying the writ of error, conclusively disposes of this question. Furthermore, the experienced trial counsel's cross-examination of the police surgeon on "truth serum" (R. B228) as well as his thorough examination of all expert witnesses clearly reflects that the qualities of the medication and the effect it might produce in the petitioner were widely explored in the trial of this case. The State Court record of the trial destroys this contention.

II.

A critical comparison of the testimony of the petitioner with that of his expert witness, Dr. Proctor, will demonstrate that the medication, administered by the police surgeon, did not produce such effects in the petitioner as would render him incapable of voluntary action. An analysis of petitioner's testimony in the light of his authorities will lead to the same conclusion.

When the surgeon visited the petitioner on Sunday evening, the petitioner complained that the previously pre-

scribed medicine was of no help to him (R. B221). Since effective doses of the drugs in question settle and calm a person, it appears that the petitioner did not observe any effect of the drugs. One must conclude that no effect on his central nervous system and, hence, on his behavior was produced.

The properties of scopolamine are discussed in *The Pharmacological Basis of Therapeutics* by Goodman and Gilman, one of the texts cited by the petitioner. In pp. 546-550, they report that this drug inhibits the glandular secretion of the nose and mouth and thus cause a drying of the mucous membranes of the respiratory tract. This is the basis for its chief use in preanesthetic medication. The salivary secretions are markedly inhibited by this drug. This causes a dryness of the mouth and difficulty in swallowing and talking. The sweat glands are inhibited and this causes the skin to become hot and dry. *The petitioner testified to none of these symptoms.*

Dr. Proctor testified that hyoscine causes cycloplegia or loss of ability to accommodate vision. This causes the subject to see distant objects more clearly than near objects (R. C537-538, 568). Goodman and Gilman in the cited text (p. 545) state that, after the use of this drug, the optical lens is *fixed for far vision and near objects are blurred.* The petitioner, however, testified that *he could see no more than two feet in front of himself* (R. B118-119).

We submit that the petitioner's description is inconsistent with the known qualities of hyoscine. Accordingly, we suggest that the dosage administered to the petitioner produced no effect on his central nervous system or his behavior, and that it did not render him incapable of free and voluntary action.

III.

With the commencement of the petition for post-conviction review in the Criminal Court of Cook County in March, 1958 (R. E11-22), the petitioner embarked upon a new approach to this controversy. The gist of that claim lies in his allegation that the fact that hyoscine and scopolamine were identical was deliberately withheld from the trial court and the petitioner by the police surgeon and the prosecuting authorities. The same claim is advanced in the petition for writ of *habeas corpus* (R. A2-20). The Supreme Court of Illinois, in its detailed memorandum order (R. A30-31), (*ante*, pp. 26-27) demonstrated the error of his factual allegations and denied the writ of error on the ground that the judgment in the first writ (*People* v. *Townsend*, 11 Ill. 2d 30), was *res judicata*. The trial record fully supports this order. It shows that defense counsel, whom the petitioner continuously describes as being experienced in the defense of criminal cases, thoroughly explored the properties and qualities of the drug and the question as to whether, in fact, a "truth serum" had been administered. This is not a case where something is discovered after trial and judgment *dehors* the record. Nor is it a case where the State did not provide a remedy. The Supreme Court of Illinois correctly determined that the nature of the drug and its effect on the petitioner, and not the label, constituted the critical issue. The identity of the two labels was disclosed to defense counsel and the trial court (R. D1173). If we assume, *arguendo*, that the petitioner had some legal issue, the evidentiary basis for any argument on that issue existed in that trial record when he prosecuted his direct review to the Supreme Court of Illinois by way of writ of error. He chose not to pursue such argument. On that state of the record, a serious question arises as to whether a person, as the petitioner, who has every opportunity to urge a claim but fails to do so and is held, in a subsequent state post-conviction proceeding to have waived it under the doctrine

of *res judicata*, can properly pursue the claim in a federal *habeas corpus* proceeding. To avoid the subversion of state criminal justice, we submit that the answer should be in the negative. Compare: *Brown* v. *Allen*, 344 U. S. 443, 485-487, 503.

During this same period, there was another occurrence which offers some insight into the petitioner's attitude toward post-conviction remedies, state as well as federal. After the challenged judgment of conviction was affirmed by the Supreme Court of Illinois, he prosecuted his first petition for writ of *certiorari* in this Court (O. T. 1957, No. 133, Misc.), wherein he expressly declared that the "drugs were administered to petitioner with his consent and with the avowed intention on the part of the police surgeon to alleviate the heroin withdrawal symptoms" (p. 8). In the very next term of this Court, the petitioner filed his second petition (O. T. 1958, No. 217, Misc.) seeking a review of the Illinois denial of a writ of error in the post-conviction proceeding. In this petition, he represented "that the circumstances were such that the drug administered to him by the police surgeon was not at his request nor with his consent" (p. 16). He further averred that he could not raise this question in his first review by the Supreme Court of Illinois because the facts did not come to the attention of his counsel until completion of the review (p. 7). The timing is important. By his own allegation, the alleged facts became known to the petitioner when they were discovered by counsel on the first review. That review was completed *before* he filed any petition for writ of *certiorari* in this Court. Why then, with his alleged knowledge of the purported new facts, did he persist in conceding that the drug was administered with his consent and for proper medical purposes in his first petition and then adopt a contradictory position in the second petition? Consent, like coercion, is a reality even though it is a subjective act. As soon as the act

of consent with all its attendant circumstances occurs, it is completed. It becomes history. No words in a subsequent pleading can change it. It cannot reasonably and realistically be described as consent in one petition and as a lack of consent in a second petition, filed one year later.

With the filing of the federal *habeas corpus* proceeding, the petitioner, for the *first* time, referred to and incorporated by reference, the minutes of the coroner's inquests on deaths other than the Boone murder (R. A9-12). He alludes to them now in his effort to establish the involuntary nature of his confession and the invalidity of the judgment of conviction for the Boone murder. This represents a complete reversal of tactics on the part of the petitioner. During the original trial, he and his concededly experienced defense counsel vigorously and successfully moved the trial judge to exclude any evidence of statements or inquest transcripts of other crimes (R. B188-191, B374, C871-872). Defense counsel characterized the coroner's minutes as being "highly prejudicial". This evidence has never been considered by any Illinois Court because the petitioner had it excluded. Since it was known to the petitioner as early as the original trial, it should not be used now to support federal *habeas corpus*. *Brown* v. *Allen*, 344 U. S. 443, 480. This procedural rule should prevail particularly in the case of one who has, by his motions for exclusion, successfully prevented the consideration of such evidence by any state court.

Moreover, we submit that the *motive* for the petitioner's trial tactics, especially with reference to the coroner's minutes, presently has a bearing on this controversy and merits consideration by this Court. Why did the petitioner describe these minutes as "highly prejudicial" when he objected to their use by the State for purposes of impeachment? This was a preliminary hearing on the issue of voluntariness. The jury was not present, and the trial judge

was certainly qualified to consider only competent evidence in reaching his decision. We submit that it can reasonably be inferred that the petitioner recognized and realized that the minutes contained damaging *voluntary* disclosures. Hence, he had them excluded.

Federal *habeas corpus* is designed to provide a remedy whereby a prisoner can test the constitutional validity of a state criminal proceeding. It is not intended to provide an appeal or a second trial. The validity of the state judgment must be tested by the state court record. Though a petitioner may decide to pursue a course of inconsistency and vacillation, he must accept the consequences of such practice. We suggest that this Court can reasonably and rightfully consider such practice of inconsistency and vacillation when it is appraising the sincerity and the plausibility of a petitioner's claim in the *habeas corpus* proceeding.

CONCLUSION

In view of the foregoing, the federal district court was correct in its findings and order of dismissal and the affirming judgment of the United States Court of Appeals should be affirmed.

Very respectfully submitted,

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